IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 588

ADOLPH T. SPALEK and WILLIAM J. ZRENCHIK,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF PETITIONERS IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI

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CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

Jurisdiction of the Court is invoked under section 240(a) of the Judicial Code as amended by the Act of

February 13, 1925, 43 Stat. 938 [USCA, Title 28, section 347(a)]. The appeal of the petitioners from the judgment of conviction in the District Court is now pending in the Circuit Court of Appeals for the Sixth Circuit. The writ of certiorari is asked to review the order of the Circuit Court of Appeals denying bail pending appeal.

The decision is in conflict with decisions of other circuit courts of appeal, and so departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision. This is more fully set out in the petition for the writ under the heading "Reasons Relied on for the Allowance of the Writ of Certiorari", in conformity with Rule 38, 5(b) of the Rules of the Supreme Court.

If the writ is not granted, the petitioners will be without relief since review by this Court, if necessary and allowed, after the court below decides the appeal on the merits, will come too late. If the conviction is reversed, the petitioners will have unjustly suffered a considerable imprisonment.

CONCISE STATEMENT OF THE CASE

Such a statement is contained in the petition for a writ of certiorari filed with this brief. We fear that to repeat it here would violate the directness and conciseness enjoined on the brief writers by section 2 of Rule 38. The statement will be found in the petition under the heading "Summary Statement of Matter Involved".

ARGUMENT

The application to the Circuit Court of Appeals was pursuant to Rule 6 of the Rules of Criminal Procedure, which reads as follows:

> "The defendant shall not be admitted to bail pending an appeal from a judgment of conviction save as follows: Bail may be granted by the trial judge or by the appellate court, or where the appellate court is not in session, by any judge thereof or by the circuit justice.
>
> "Bail shall not be allowed pending appeal unless it appears that the appeal involves a substantial question which should be determined by the appellate court."

The first paragraph of the rule simply designates those judicial officers empowered to grant bail.

The second paragraph attaches a condition: bail shall not be granted unless the appeal involves a substantial question which should be determined by the appellate court.

The latter condition is one which had been attached for many years past by judicial decision to the right to bail after conviction. *McKnight v. United States,* 113 Fed. 451; *United States v. Motlow,* 10 Fed. (2d) 657; *Rossi v. United States,* 11 Fed. (2d) 264; *United States v. Bennett,* 36 Fed. (2d) 475; *Lewis v. United States,* 14 Fed. (2d) 111.

Rule 6, therefore, to this extent, is merely declaratory of the pre-existing rule of law. (The language of Rule

42(a)(2) in the Preliminary Draft of the revision of the Rules of Criminal Procedure makes this point even clearer than the present Rule 6. The note to this Subdivision (p. 185) states that it is a restatement of Rule 6, with two exceptions not pertinent here.) It does not purport to affect or limit the principles laid down by the decisions of the circuit courts of appeals governing the right to bail pending appeal. We should look to those decisions (and we have above referred to the leading cases on the point, the *Motlow* and *McKnight* cases being cited with particular frequency by the federal courts), for the principle determining the right of the petitioners to bail.

It is petitioners' position:

1. That there are substantial questions involved on the appeal.

2. That, therefore, petitioners are entitled to be enlarged on bail pending appeal.

As to the first point, we have already stated in the petition for certiorari that the trial judge stated on the record after refusing bail that he knew the petitioners' appeal from the judgment of conviction was not merely for the purpose of delay and that there were questions of law in the case which should be appealed. It would seem that this statement of the trial judge ought to be conclusive; however, the petitioners in their application for bail to the appellate court (paragraph 7) set forth the facts and issues of the case and pointed out several of the substantial questions involved.

This, it is submitted, is sufficient to meet the condition. As was said in the *Motlow* case, *supra*, (at page 663, 1st column, near bottom):

> "But the law does not require applicants for bail to show that they are entitled to a reversal."

The test was stated in other language in *Lewis v. United States, supra*, where the Court said that in determining whether bail should be granted, the only question to be considered was:

> "Are the errors assigned frivolous, and, is the appeal merely taken for delay? If this were a *debatable question* it would be the duty of a judge to grant bail." (Emphasis is ours.)

In view of the trial judge's statement, which is confirmed by the matters pointed out in paragraph 7 of the application for bail, surely petitioners have met this condition. Some of the questions involved on the appeal have never been adjudicated by a federal appellate court. One example is the question of criminal liability under Section 80 of Title 18, USCA (presenting false claims), where there is a complete absence of contractual relations and business dealings between the defendants and the Government.

The trial consumed some seventeen weeks. The stenographic transcript is about 8,000 pages. It is not likely that petitioners would go to the great expense of appeal in bad faith and merely for the purpose of delay.

The Circuit Court of Appeals filed no opinion and made no finding that no substantial questions were involved (Order of Circuit Court of Appeals).

Under the circumstance, the Circuit Court of Appeals, we submit, should have granted bail. We have been able to find no case, where a substantial question on appeal existed, in which bail was refused. In those cases where

bail is denied, there is the absence of substantial questions.

The proper rule has been consistently laid down in the cited cases. To illustrate this general statement we shall quote from some of them.

In the *Motlow* case, *supra*, Mr. Justice Butler said (p. 662, 2d column):

> "Abhorrence, however great, of persistent and menacing crime will not excuse transgression in the courts of the legal rights of the worst offenders. The granting or withholding of bail is not a matter of mere grace or favor. If these writs of error were taken merely for delay, bail should be refused; but, if taken in good faith, on grounds not frivolous but fairly debatable, in view of the decisions of the Supreme Court, then petitioners should be admitted to bail."

In *United States v. Bennett*, *supra*, the Fifth Circuit Court of Appeals said:

> "It is the settled law in the federal courts that a person who has been convicted on a criminal charge is likewise entitled to bail pending his appeal, except where it is plainly made to appear that an appeal is frivolous or taken only for delay," citing cases we have referred to and also *Hanes v. United States*, 299 Fed. 296, and *Howell v. United States*, 10 Fed. (2d) 504.

We submit, therefore, that the Court below should have granted bail, and, it having refused without any finding that the appeal was frivolous and that no substantial questions existed, this Court should exercise its power of supervision. For, we respectfully suggest, the Court be-

low departed far from the accepted and usual course of judicial proceedings. The Court below also decided the matter in conflict with the decisions of other circuit courts of appeals.

These are the reasons we ask that this Court issue the writ of certiorari.

Respectfully submitted,

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Dated: January 8, 1944.

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